THE ACT OF STATE DOCTRINE DOES NOT BAR THIS INTERPLEADER ACTION.

A. Introduction.

Defendants Republic of the Philippines and the Presidential Commission on Good Government (PCGG)(hereafter referred to as "PCGG") argue that the present interpleader action is barred by the act of state doctrine. Their argument is that this interpleader action, governing the distribution of the Arelma Merrill Lynch account, will interfere "with the orders of assistance rendered to the Philippines by the Swiss government." The argument presented by the PCGG is meritless for several reasons. The PCGG has not carried its burden of establishing that the judicial act of the Swiss court meets the formal requirements of being an official "act of state," nor has it demonstrated that the interpleader action in the U.S. District Court would require any U.S. court to question the legitimacy of the Swiss action. And most significantly, as explained below, because the property in dispute is not within the jurisdiction of Switzerland, the act of state doctrine has no applicability to any Swiss action that attempts to control the property, even if it could be established that an act of state occurred, the legitimacy of which might be questioned by the U.S. court.

At page 11 of its memorandum, the PCGG offers the "classic formulation" of the act of state doctrine from *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897): "the courts of one country will not sit in judgment on the acts of the government of another country *done within its own territory*" (emphasis added). It is undisputed by the parties in this case that the Merrill Lynch account in dispute is not, in fact, in Switzerland, but is rather in the United States, where it has always been. If the action of the Swiss court was designed to govern these assets within the United States, then the Swiss court was attempting to govern matters extraterritorially, outside of

its own territory, and the act of state doctrine would not be applicable to its decree.

B. <u>The Burden Is on the PCGG to Prove That an Act of State Occurred</u>.

The U.S. Supreme Court held squarely in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691, 694-95 (1976), that the party attempting to hide behind the act of state doctrine has the burden to prove that an event occurred that constitutes an act of state. *See also Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988)(*en banc*), *cert. denied,* 490 US. 1035 (1989)(confirming that "[t]he burden of proving acts of state rests on the party asserting the applicability of the doctrine"); *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989)(adding that "[a]t a minimum, this burden requires that a party offer some indication that the government acted in its sovereign capacity and some indication of the depth and nature of the government's interest").

C. <u>The Swiss Judicial Order Is Not an Act of State Because It Is Only a Provisional and Temporary Act, Not a Final and Conclusive One, and Because It Was Issued by a Court Rather than by the Executive Branch</u>.

A matter rises to the status of an "act of state" only if it is an official and final act formally decreed by a government. To qualify, an event must be "the public act of those with authority to exercise sovereign powers" sufficient to be "entitled to respect in our courts." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976). In *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1535 (D.C. Cir. 1984), *vacated on other grounds*, 105 S.Ct. 2353 (1985), an *en banc* panel ruled that a decree issued by the President of Honduras saying that property "shall be expropriated under the right of eminent domain on account of public exigency and for the public good" was not an act of state because "a conclusive foreign act must be completed before the doctrine is invoked," *id.* at 1535 n. 154 (relying on language in the

Restatement (Second) of the Foreign Relations Law of the United States (1965), sec. 43 comment a, which said that the "act of state doctrine...becomes applicable only when and if the act has been fully executed").

A judgment issued by a court is usually not an act of state, because such a judgment "involves the interests of private litigants" and "court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to its public interests." *Liu v. Republic of China*, 892 F.2d 1419, 1433 (9th Cir. 1989), *cert. dismissed*, 497 U.S. 1058 (1990)(quoting from *Restatement (Second) of Foreign Relations Law of the United States* (1965), sec. 41 comment d). Numerous cases illustrate that U.S. courts are reluctant to grant the elevated "act of state" status to events that occur in the context of administrative or judicial proceedings. *See, e.g.*, *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 607-08 (9th Cir. 1976)(refusing to grant "act of state" status to the administrative actions of the Honduran government and its judicial decrees); *Mannington Mills, Inc. v. Congoleum Corp.* 595 F.2d 1287, 1295 (3rd Cir. 1979)(refusing to grant "act of state" status to a foreign sovereign's grant of a patent); *Faysound Ltd. v. Walter Fuller Aircraft Sales, Inc.*, 748 F.Supp. 1365 (E.D.Ark. 1990)(ruling that a foreign judicial judgment did not rise to the status of an act of state).

D. <u>This Interpleader Action Does Not Require U.S. Courts to Examine the Legitmacy of the Swiss Decision</u>.

In *W.S. Kirkpatrick & Co. v. Environmdntal Tectonics Corp., Int'l,* 493 U.S. 400, 405 (1990), the U.S. Supreme Court explained that the act of state doctrine is not relevant to a case in which a court can grant the requested relief without "declar[ing] invalid the official act of a foreign sovereign performed within its own territory." Because the assets in dispute are within

the jurisdiction of the United States, the actions taken by the U.S. courts regarding these assets are not inconsistent with actions taken by the Swiss government regarding assets within its control. Because the two court systems can operate separately within their separate spheres of jurisdiction, the act of state doctrine is not implicated.

E. The Act of State Doctrine Is Inapplicable Because the Purported Act of the Swiss State Did Not Concern Matters "Within Its Own Territory."

As the PCGG Memorandum explains at page 7, Arelma, S.A., is a Panamanian corporation established with the "sole business" of maintaining a Merrill Lynch account in New York. At page 12 n.6, the PCGG recognizes "that Arelma's only reason for being was the Merrill Lynch account." The PCGG also acknowledges at page 2 of its Memorandum that "Merrill Lynch has held the Arelma assets for many years," and thus that these assets have always been located in the United States. Just as the essential locus of a bank deposit is at the location of the branch where the deposit was made, *see Hilao v. Estate of Marcos*, 95 F.3d 848, 851 (9th Cir. 1996), the essential locus of the Merrill Lynch account was in New York, where the investment was made and managed. If the Swiss court purported to freeze these assets, it was seeking to extend the reach of its decree to assets outside its jurisdiction.

The act of state doctrine, but its very terms, is limited to activities undertaken by a government regarding matters "within its own territory." *See Underhill v. Hernandez,* 168 U.S. 250, 252 (1897); *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 452 U.S. 682, 691 n.7 (1976). U.S. courts have repeatedly refused to apply the doctrine to activities and assets located outside the country that has exercised an "act of state." *See, e.g., Liu v. Republic of China*, 892 F.2d 1419, 1431-33 (9th Cir. 1989)(refusing to apply the act of state doctrine to the Republic of

China's murder of an individual within the United States, because an inquiry into the "legality and propriety of an act that occurred within the borders of the United States...would hardly affront the sovereignty of a foreign nation"); *Letelier v. Republic of Chile*, 488 F.Supp. 665 (D.D.C. 1980)(refusing to apply the act of state doctrine to the Republic of Chile's activities in planning the assassination of an individual within the United States); *Flatow v. Islamic Republic of Iran*, 999 F.Supp 1, 24 (D.D.C. 1998)(refusing to apply the act of state doctrine to the Islamic Republic of Iran's participation in the bombing of a bus in Israel, even if the actions taken by Iran were on Iranian soil, in part because "the bombing complained of" was not "perpetrated within the Islamic Republic of Iran"); *Restatement (Third) of the Foreign Relations Law of the United States* (1987), sec. 443 Reporters' Note 4 ("The act of state doctrine does not extend to takings of property located outside of the territory of the acting state at the time of the taking, even if the property belonged to an enterprise based in that state.")

Because the property in dispute is within the United States, any action taken by any Swiss governmental body regarding this property would thus not be covered by the act of state doctrine.

CONCEPTS OF "INTERNATIONAL COMITY" DO NOT BAR THIS INTERPLEADER ACTION

International "comity" refers to a spirit of cooperation in which the tribunal of one country approaches the resolution of cases affecting the law and interests of another country. *Society Nationale Industrielle Aerospatiale v. District Court*, 482 U.S. 522, 543 n. 27 (1987). Its foundation is the principle of "reciprocity," which underlies all international discourse. *Hilton v. Guyot*, 159 U.S. 113 (1895); *Restatement (Third) of Foreign Relations Law of the United States*

(1987), sec. 403 Comment a and Reporters' Note 5.

In the present case, the courts of the Philippines have refused to accord comity to the decisions of the U.S. courts in the Marcos Human Rights Litigation, even though the U.S. courts were providing a forum to fulfill the international law obligation accepted by the United States to adjudicate claims for compensation, when jurisdictional prerequisites are met, by victims of gross violations of fundamental human rights. In *Republic of the Philippines v. Marcos,* Civ. Case No. 0141 (Sandiganbayan, July 27, 1999), the Sandiganbayan court refused to approve the settlement reached by the human rights victims, the Marcoses, and the Philippine government despite the explicit recognition of the Swiss Federal Supreme Court in its December 10, 1997 ruling in *Federal Office for Police Matters v. District Attorneys' Office IV for the Canton of Zurich*, 1A.87/1997/err, that the Philippine government had a responsibility to facilitate the compensation of the human rights victims for their injuries and suffering. The Swiss Court stated that under the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985), "victims of serious human rights violations are entitled to compensation and to a fair trial, in which they can assert their claims for compensation." *Federal Office for Police Matters,* sec. 7(c)(cc). The Swiss Court also recognized that the "Philippine judiciary has a reputation for being slow-moving and susceptible to corruption and political influence,"*id.* sec. 7(c)(ee), and instructed the Philippine government to "keep the Swiss authorities up to date on the status of these proceedings and on the precautions and procedures applied to compensate the victims of human rights violations under the Marcos regime." *Id.* sec. 7(c)(gg).

Because of the complete lack of cooperation on the part of the Philippine judiciary with the Marcos Human Rights Litigation, in spite of the explicit requirement of the Swiss court that such cooperation be provided, the reciprocity underlying a comity requirement is lacking, and the U.S. courts have no obligation to provide such comity to the PCGG. The PCGG asserts that the Philippines have a greater interest in the dispute over the Marcos' assets, but because gross violations of fundamental human rights have occurred, universal jurisdiction exists to provide a proper remedy for the victims, and all humans have a stake in ensuring that proper compensation be provided to the victims. From the very beginning of the Marcos Human Rights Litigation, the Philippine government strongly encouraged the courts of the United States to provide a forum to adjudicate the human rights claims, and the U.S. courts have provided such a forum. *See In re Estate of Ferdinand Marcos Human Rights Litigation*, 94 F.3d 539, 547 (9th Cir. 1996)(explaining the *amicus curiae* brief submitted by the Philippine government). This human rights litigation has been underway for 15 years, and the U.S. Court of Appeals for the Ninth Circuit has repeatedly confirmed the legitimacy of the U.S. jurisdiction over the human rights dispute. *See, e.g., Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992)), *cert. denied*, 508 U.S. 972 (1993); *In re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); and 103 F.3d 762 (9th Cir. 1996)). The United States thus has a strong interest in ensuring the proper resolution of this dispute, and it is improper to conclude that Philippine interests are stronger than those of the United States.